STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 21, 2000
v	No. 214588 Emmet Circuit Court
TIMOTHY SCOTT PENROSE, Defendant-Appellant.	LC No. 98-001336 FH

Before: Markey, P.J., and Murphy and R.B. Burns*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a vehicle while under the influence of intoxicating liquor, third offense (OUIL), MCL 257.625(7); MSA 9.2325(7), and operating a vehicle with a suspended driver's license, second offense (DWLS), MCL 257.904(1)(b); MSA 9.2604(1)(b). Defendant was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to twelve months' confinement for the OUIL conviction and ninety days' confinement for the DWLS conviction. Defendant appeals by right. We affirm defendant's convictions and sentences but remand for the correction of his presentence investigation report.

I

Defendant argues that he presented sufficient evidence to establish a prima facie case for the defense of necessity. We disagree. Whether a defendant successfully raises the defense of necessity is a question of law. See *People v Lemons*, 454 Mich 234, 249-250; 562 NW2d 447 (1997). We review questions of law de novo. *People v Stevens*, 460 Mich 626, 631; 597 NW2d 53 (1999).

During defense counsel's opening statement, counsel told the jury:

> [L]adies and gentlemen, this is a case about necessity, about whether or not the circumstances confronting [defendant] when he got behind the wheel on March [1, 1998] were serious enough to provide justification of his choice to drive after

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

> drinking . . . . The evidence presented today will show that my client's behavior was necessary.

When the jury was excused for lunch, the court ruled on the prosecution's motion in limine to bar defendant from arguing the defense of necessity regarding the OUIL charge. Defendant offered as proof defendant's wife's testimony that she was overtaken by severe and uncontrollable bouts of severe back pain and leg cramps that precluded her from functioning and continuing to drive, so defendant got behind the wheel to drive the family home. The trial court determined that there was insufficient proof to permit the necessity defense to go to the jury given that defendant's wife's back and leg cramps would not create in the mind of a reasonable person the fear of death or serious bodily harm.

The submission of a defense theory to the jury is akin to requesting a jury instruction regarding the defense: a trial court is required to give a requested instruction except where the theory is not supported by the evidence. *Lemons, supra* at 245 n 14. There must be some evidence from which each element of the defense may be inferred, thereby establishing a prima facie case, before the defense may be considered by the jury. *People v Hubbard,* 115 Mich App 73, 77; 320 NW2d 294 (1982); see also *People v Ramsdell,* 230 Mich App 386, 401; 585 NW2d 1 (1998).

Necessity is defined as:

> An act which would otherwise constitute a crime may also be excused on the ground that it was done under compulsion or duress. The compulsion which will excuse a criminal act, however, must be present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. A threat of future injury is not enough. [*Hubbard, supra* at 78.]

The threatening conduct or compulsion must be "present, imminent, and impending; a threat of future injury is not enough." *Lemons, supra* at 247.

In order to properly raise the defense of necessity, the defendant must produce some evidence of each of the following elements:

> (A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> (B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> (C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> (D) The defendant committed the act to avoid the threatened harm. [*Lemons, supra* at 246-247.]

Moreover, a defendant's criminal act must support an inference that the criminal act would have alleviated the impending harm. *Hubbard, supra* at 80.

The record shows that defendant was driving the car at the time he was stopped by the police and that he was under the influence of alcohol. Defendant asserted that he was driving because his wife began to suffer from leg spasms that prevented her from continuing to drive the car. The record provides insufficient evidence, however, that this situation constituted it a necessity for defendant to drive.[1] We conclude that there could be no reasonable apprehension of death or serious bodily harm either to defendant or to his wife. See *Lemons, supra* at 247; *Hubbard, supra* at 78. Rather, in our view, defendant himself increased the risk of death or bodily harm when defendant, while intoxicated, got behind the wheel and drove out onto the highway.

Defendant further argues that the trial court imposed a "fifth" element to the defense of necessity: the non-availability of options. We conclude defendant's argument to be without merit.

CJI2d 7.6, setting forth the instruction regarding duress states, in pertinent part:

> (4) Think about the nature of any force or threats. . . . Think about the defendant's situation when [he] committed the alleged act. *Could [he] have avoided the harm [he] feared in some other way than by committing the act? Think about how reasonable these other means would have seemed to a person in the defendant's situation at the time of the alleged act.* [CJI2d 7.6(4) (emphasis added).]

CJI2d 7.6(4) provides that it is proper to consider whether the perceived harm could have been avoided "in some other [reasonable] way than by committing the act." Thus, we conclude the trial court's consideration that other, more reasonable and safer options were available to defendant did not constitute the addition of an improper element and was thus not error. Moreover, given our conclusion that defendant failed to establish a prima facie showing of necessity, we decline to address whether this necessity is a defense to an OUIL charge,[2] even though it is permitted as a defense to DWLS. See MCL 257.904(6); MSA 9.2604(6) ["This section does not apply to a person who operates a vehicle solely for the purpose of protecting human life or property if the life or property is endangered and summoning prompt aid is essential"].

II

Defendant next argues that the trial court erred in refusing to grant a mistrial after defense counsel promised to present evidence on the defense of necessity. We disagree. We review a trial court's decision regarding a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Id.*

Further, with regard to harmless error, MCR 2.613(A) provides:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

Similarly, MCL 769.26; MSA 28.1096 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

The statute and court rule employ different articulations of what constitutes harmful error. Each conveys a need for a determination of prejudice. *People v Mateo,* 453 Mich 203, 214; 551 NW2d 891 (1996).

We conclude that the trial court's denial of defendant's motion for a mistrial was not an abuse of its discretion. First, as addressed above, defendant failed to establish a prima facie case regarding his necessity defense. Thus, no rational jury could have concluded that defendant's criminal acts were excused. Second, in denying defendant's motion for a mistrial, the trial court also gave him the opportunity to revisit the court's ruling if additional evidence could be presented beyond what was contained in his original offer of proof. Thus, the preclusion of defendant's necessity defense was not, as of the time of counsel's motion for mistrial, necessarily final and preclusive. Moreover, our review of the record fails to demonstrate sufficient prejudice to defendant after defense counsel alluded to necessity in her opening argument, and the defense was later ruled inadmissible.

Also, where a proper curative instruction can be given, a miscarriage of justice will not be found. See *People v Wilson,* 230 Mich App 590, 595; 585 NW2d 24 (1998). In the present case, the trial court properly instructed the jury, at the close of proofs, that the statements and arguments of the attorneys were not to be considered as evidence. Thus, the instruction reasonably cured any prejudicial effect caused by defendant's inability to introduce a defense of necessity, in light of defense counsel's opening argument. See *id.*

III

Defendant next argues that he was denied effective assistance of counsel when defense counsel failed to obtain a ruling on the admissibility of defendant's necessity theory before her opening statement. Again, we disagree. Defendant failed to create a testimonial record in the trial court with

regard to his claim of ineffective assistance of counsel. Defendant's failure forecloses appellate review unless the record contains sufficient detail to support this claim. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998). We review claims of ineffective assistance of counsel de novo. See, e.g., *People v Northrop*, 213 Mich App 494, 497-498; 541 NW2d 275 (1995).

Effective assistance of counsel is presumed. The defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine: (1) whether counsel's performance was objectively unreasonable, and (2) whether the defendant was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). To satisfy the first prong of the test, the defendant must establish that counsel made errors so serious that the attorney was not functioning as the counsel guaranteed to the defendant by the Sixth Amendment. *Id*. at 164-165. To satisfy the second prong, the defendant must show that but for counsel's ineffective assistance, there is a reasonable probability that the outcome would have been different. *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998).

Defense counsel's performance must be measured against an objective standard of reasonableness. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Id*. A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Rice*, 235 Mich App 429, 444; 597 NW2d 843 (1999). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential. *People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995).

In light of the record before us, we find that defense counsel's decision or failure to request a ruling on the prosecution's motion in limine before making her opening statement was neither objectively unreasonable nor prejudicial to defendant. It is reasonable to conclude that defense counsel considered her proofs regarding defendant's necessity defense as sufficient and thus decided that a hearing prior to the beginning of trial was unnecessary. See *Reed, supra* at 391; *LaVearn, supra* at 216. That her strategy failed cannot constitute ineffective assistance of counsel. *Stewart, supra* at 42. Our highly deferential assessment of defense counsel's action fails to demonstrate ineffective assistance of counsel.

Moreover, our review of the record fails to show that, but for counsel's alleged error, the outcome of the trial would have been any different. See *Plummer, supra* at 307. If, in fact, defense counsel had requested a hearing before her opening statement, and the trial court ruled as it did, defendant would have been precluded from presenting his necessity defense. This is precisely what occurred in the present case where the jury found defendant guilty. Thus, we conclude counsel's alleged error was not sufficiently prejudicial. *Id*.

IV

Defendant's final argument is that he is entitled to a corrected presentence investigation report (PSIR). We agree. At sentencing, either party may challenge the accuracy or relevancy of any information contained in the PSIR. MCL 771.14(5); MSA 28.1144(5); MCR 6.425(D)(2)(b); *People v Hoyt*, 185 Mich App 531, 533-534; 462 NW2d 793 (1990). The information is presumed to be accurate. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). The sentencing court has a duty to respond to challenges to the accuracy of presentence information. *People v Sutton*, 158 Mich App 755, 761; 405 NW2d 209 (1987). In response, the sentencing court has wide latitude. It may determine the accuracy of the information, accept the defendant's version, or, as a matter of expediency, disregard the challenged information. *Hoyt, supra*, at 534-535. When a sentencing court disregards information challenged as inaccurate, the court effectively determines that the information is irrelevant and the defendant is entitled to have the information stricken from the report. *People v Fleming*, 428 Mich 408, 418; 410 NW2d 266 (1987). *People v Newson (After Remand)*, 187 Mich App 447, 450; 468 NW2d 249 (1991), vacated in part on other grounds 437 Mich 1054 (1991).

Defendant argues that the trial court agreed to strike information in his PSIR that (1) he was involved in a motor vehicle accident in 1992, and (2) his father was a "heavy drinker." Our review of the record shows that the trial court ruled that this information should be stricken from the PSIR. The record also shows that the trial court, in sentencing defendant, did not take any of the disputed information into consideration. Defendant's PSIR still reflects some of the disputed information ordered stricken by the trial court. Defendant is, therefore, entitled to a corrected PSIR. See *Fleming, supra at* 418, *Newson supra* at 450. We therefore remand to the trial court for the challenged information be removed from the PSIR, and for a corrected copy to be transmitted to the Department of Corrections.

Defendant's convictions and sentences are affirmed. We remand in part for the correction of defendant's PSIR. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Robert B. Burns

[1] Critically, defendant failed the field sobriety tests. Both police officers who stopped defendant's vehicle testified that defendant's wife was also "highly intoxicated" and had to be driven home along with the parties' infant.

[2] Cf. *People v Demers*, 195 Mich App 205, 207; 489 NW2d 173 (1992) (a trial court may exclude from the jury testimony concerning a defense that has not been recognized by the Legislature as a defense to the charged crime); *Hubbard, supra* at 79 (the necessity defense is unavailable in an area where there has been exhaustive legislative debate and legislation).